

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

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MAR 28 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EMERGENCY PETITION FOR WAIVER

Pursuant to Sections 1.3 and 24.819(a) of the Commission's rules, Telephone Electronics Corporation ("TEC"), through its counsel, respectfully requests a limited waiver of the Commission's rules as set forth in the Fifth Report and Order, 9 FCC Rcd 5532 (1994) and Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994) in PP Docket No. 93-253.¹

Specifically, TEC requests a waiver of Section 24.709(a)(1) of the rules to the extent that rule is applied to include the gross revenues of TEC's non-rural telephone company affiliates in determining whether a rural telephone company meets the gross revenue cap of \$125 million in each of the last two calendar years, established in Section 24.709(a)(1). TEC does not seek a waiver of the gross revenue cap itself, or of the \$500 million total assets cap.

In an earlier phase of this proceeding TEC sought to bid on channel C and F licenses in both rural areas and urban metropolitan areas. In this request for a waiver, however, TEC's rural telephone companies now seek a limited waiver that would permit its rural telephone companies to bid on channel C and F licenses only

¹ 47 C.F.R. §§ 24.701 through 24.720.

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in those basic trading areas ("BTAs") where they provide telephone service and which have a population of less than 300,000, as defined in the 1990 census.²

In addition to seeking a waiver that would allow TEC's rural telephone companies to bid in the auction on that limited basis, TEC requests a waiver of the rules to the extent such a waiver is necessary to permit TEC's rural telephone companies to receive the 10% bidding credit provided other small businesses, and, in the event any of its rural telephone companies are successful in the bidding process, to permit those companies to utilize the payment installment procedure that is available to all other designated entities bidding in the auction for licenses in the entrepreneurs' blocks.³

Legal Argument

Under Section 1.3 of the Commission's rules, the Commission has the discretion of waiving its rules on a showing of good cause. The Commission may exercise this discretion where the factual

² Since two of TEC's rural telephone companies have exchanges located in BTAs with populations in excess of 300,000, TEC also requests confirmation that under the Commission's rules TEC's rural telephone companies are eligible to obtain partitioned channel C and F licenses in all BTAs where they provide telephone service including those with populations in excess of 300,000.

³ As the Commission is aware, TEC has previously sought unlimited access to the upcoming auction for licenses in the entrepreneurs' blocks. Although TEC continues to believe that it is legally entitled to such relief, it is now willing to narrow the scope of its request to BTAs with populations less than 300,000, as described herein. Thus, TEC's petition presents the Commission with a request for relief that has not previously been before the Commission, either in the context of TEC's comments filed in the underlying rulemaking, its petition for reconsideration or its pending appeal to the U.S. Court of Appeals.

circumstances make strict compliance with the rules inconsistent with the public interest. See Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d 1164 (D.C. Cir. 1990). Further, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. WAIT Radio v. F.C.C., 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

Good cause exists here for granting the waiver requested by TEC. TEC is a holding company of several small, privately-owned entrepreneurial businesses with operations centered largely in rural areas of this country. Its core business consists of six small rural telephone companies. TEC's largest rural telephone company, Bay Springs Telephone Company, serves 9,658 access lines in 14 rural communities in Mississippi. Its smallest rural telephone company, National Telephone Company of Alabama, serves 1,983 access lines in three Alabama exchanges. In its rules, the Commission defines "rural telephone company" as a local exchange carrier having 100,000 or fewer access lines, including all affiliates.⁴ Even when combined, all of TEC's rural telephone companies have significantly fewer than 100,000 access lines, meeting the Commission's test for being a "rural telephone company".

Congress has mandated that preferential treatment for rural telephone companies be provided in the auction in order to meet Congress's objective of ensuring the development and speedy

⁴ 47 C.F.R. § 24.270(e).

deployment of new technologies and services for the benefit of the public residing in rural areas. 47 U.S.C. § 309(j)(3). TEC's rural telephone companies are ideally suited for serving this purpose. TEC has limited its request for a waiver to those BTAs in which TEC's rural telephone companies presently have exchanges that are used exclusively to provide service to rural areas. TEC's rural telephone companies specifically request a waiver of the Commission's rules to enable them to bid on the channel C and F licenses in eight BTAs: BTA No. 246 Laurel, MS; BTA No. 186 Hattiesburg, MS; BTA No. 292 Meridian, MS; BTA No. 17 Anniston, AL; BTA No. 334 Opelika-Auburn, AL; BTA No. 146 Florence, AL; BTA No. 211 Jackson, TN; and BTA No. 83 Clarksville, TN. Under this waiver, TEC would be permitted to upgrade service to the customers of its rural telephone companies by providing personal communication services. TEC does not seek through this request for a waiver to bid on channel C and F licenses for non-rural BTAs, defined as those with populations in excess of 300,000 people.

In addition, TEC's rural telephone companies, standing alone and aggregated together, have gross revenues of less than \$40 million in each of the last three calendar years. This meets the Commission's definition of a "small business" for purpose of qualifying for the 10% bidding credit. 47 C.F.R. § 24.720(b). In addition, the Commission's rules define a "small telephone company" as any local exchange carrier with annual revenue from regulated communications operations of less than \$40 million, and 50,000 or fewer access lines. 47 C.F.R. §§ 61.39(a), 69.602(a)(3). TEC's

local telephone companies meet this definition of a "small telephone company."

TEC's rural telephone companies only fail to qualify for bidding in the auction for licenses in the entrepreneurs' blocks, and for receiving the 10% bidding credit provided to small businesses, when the Commission's affiliation rules are applied to include the revenues of TEC's subsidiary "reseller" companies that provide long distance services. Those non-regulated affiliates had combined gross revenues of more than \$125 million in each of the last two calendar years. However, TEC and all of its affiliates have less than \$500 million in total assets. With the exception of the rural telephone companies covered by this waiver, TEC is not aware of any other rural telephone companies, as defined by the Commission's rules, without cellular interests, that have been prohibited from bidding on channel C and F licenses in the BTAs where they provide telephone service. Although the Commission's affiliation rules serve a rational purpose in the context of most affiliate businesses, it is inequitable and contrary to public interest to apply them in the unique circumstances presented here.

First, as the Commission is aware, there are already in place regulatory and corporate barriers that prevent a rural telephone company such as Bay Springs Telephone Company from cross-pooling with its non-regulated affiliates. These barriers are unique to holding companies such as TEC that own interests in independent corporations that include highly regulated rural telephone companies and separate non-regulated businesses. This structural

separation when combined with the Commission's interaffiliate transaction rules effectively eliminate the need to rely on the Commission's affiliation rules to screen out bidders from the entrepreneurs' block auction that are too large.

Second, the nature of TEC's non-regulated affiliates add to the uniqueness of these circumstances. The TEC affiliates which cause TEC's rural telephone companies to be ineligible for the auctions of the entrepreneurs' blocks and for the 10% bidding credit are all long distance telephone service resellers. Such resellers are volume-intensive business with high operating costs and small profit margins. They collect large amounts of gross revenues from their customers but then immediately turn around and pay a high percentage of those revenues to local exchange carriers in the payment of access charges. When combined with the regulatory and corporate barriers that are unique to a holding company such as TEC that owns interests in structurally separated, regulated and non-regulated telephone companies, the high gross revenue/low profit margin nature of TEC's reseller affiliates presents a unique situation that merits a waiver of the Commission's affiliation rules.

In addition to being inequitable, application of the Commission's affiliation rules under these circumstances would be against the public interest, as stated by Congress, in ensuring that PCS service is made available in rural areas without undue delay. Absent the waiver, TEC's rural telephone companies, which are ideally suited to provide that service to its rural customers,

would be unable to participate in the auction. Even if permitted to participate in the auction through a waiver that did not provide a 10% bidding credit, TEC's small rural telephone companies would be at a severe competitive disadvantage in bidding against other entities that would have at least a 10% bidding credit, and in the case of minority or female designated entities, a 15% or 25% bidding credit. For the same reasons, TEC merits a waiver of the Commission's rules to the extent a waiver is necessary to permit TEC's rural telephone companies to pay for any winning bids in ten annual installments, under the same procedures that apply to all other bidders in the entrepreneurs' block auctions.

The public interest would be served by a grant of the requested waiver for an additional reason. As the Commission knows, TEC has appealed the Commission's rules to the U.S. Court of Appeals on the ground that TEC's rural telephone companies were improperly excluded from the auctions for licenses in the entrepreneurs blocks, and a stay of the auctions has been issued by the court as a result. TEC shares in the public interest in having the auctions proceed in a timely fashion, and the irreparable harm that TEC would suffer if it is excluded from the auction would be greatly reduced if its rural telephone companies were permitted to participate in the auctions under the limited waiver requested. For that reason, TEC would have no incentive to continue with its appeal, and its lawsuit could be dismissed, allowing the auctions to proceed without further delay.

Conclusion

TEC respectfully submits that the special circumstances described above warrant a deviation from the Commission's rules, and that such a deviation would better serve the public interest than would strict adherence to those rules. See Northeast Cellular, 897 F.2d at 1166. The requested waiver carefully balances the public interest in providing PCS service to rural areas with the public interest in providing other designated entities with enhanced opportunities to participate in providing PCS service. For these reasons, TEC respectfully requests favorable action on this petition.

Respectfully submitted,

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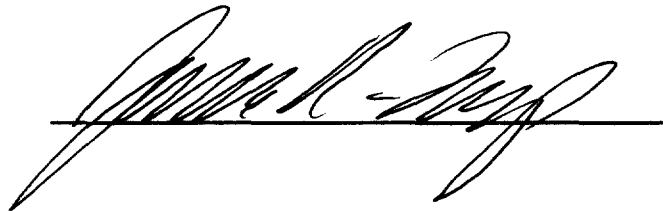
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 1995, a copy of the foregoing Petition for Waiver was served by first-class mail, postage prepaid, upon the persons listed on the attached service list.

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